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No. 84-1106

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS AND LABORERS LOCAL UNION 261,
Petitioners,

v.

FREDERICK MEISWINKEL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR FREDERICK MEISWINKEL, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court correctly vacated an arbitration award because it did not draw its essence from the collective bargaining agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 744 F.2d 1374. The order of the United States District Court for the Northern District of California granting summary judgment (Pet. App. B) was entered on June 22, 1983, and the order of the United States District Court for the Northern District of California denying the Motion for Alteration, Amendment or Vacation of Judgment (Pet. App. C) was entered on August 29, 1983; the orders are not reported.

JURISDICTION

The opinion of the court of appeals for the Ninth Circuit was entered on October 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Vacating the decision of an arbitrator, the United States District Court found that "the award exceeded the arbitrator's jurisdiction under the contract."[1] The District Court's findings are based on the following facts.

Frederick Meiswinkel, Inc. ("Meiswinkel"), a construction contractor, was bound to a collective bargaining agreement with Petitioners Northern California District Council of Laborers, and Laborers Union Local No. 261 ("Laborers"). That agreement describes the work jurisdiction of Petitioners as "[a]ll Laborers' work necessary to tend the carpenters and other building trades craftsmen . . . all cleanup of debris, grounds, and building . . . and all General Laborers' work. . . ."

Meiswinkel was also bound to a collective bargaining agreement with the Bay Counties District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America ("Carpenters"). Under that agreement the Carpenters' work jurisdiction includes "scrapping" or "cleanup" work.

In September of 1981, Meiswinkel assigned certain cleanup work to the Carpenters. As a result, the Laborers

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[1] The United States District Court also held that the award conflicts with a preeminent decision of the National Labor Relations Board. As the Ninth Circuit concluded that the District Court correctly vacated the award on the ground that it did not draw its essence from the collective bargaining agreement, it found it unnecessary to decide whether the National Labor Relations Board's decision must be given preeminence.

picketed the job site in an effort to force Meiswinkel to reassign the work from employees represented by the Carpenters to employees represented by the Laborers. Meiswinkel sought a resolution of the dispute from the National Labor Relations Board (NLRB).[2]

A hearing was conducted by the NLRB pursuant to Section 10(k) of the National Labor Relations Act, 29 U.S.C. § 160(k), at which the Laborers, Carpenters and Meiswinkel were represented. On December 7, 1982, the Board issued its Section 10(k) determination, awarding the scrapping and cleanup work to the Carpenters.

Meanwhile, during the period that the jurisdictional dispute was pending before the NLRB, the Laborers pursued a grievance to arbitration alleging that Meiswinkel's failure to employ Laborers for the cleanup work violated their collective bargaining agreement. Throughout the grievance proceeding, Meiswinkel objected to the arbitrator's authority to decide this issue on the ground that Section 9 of the Laborers' collective bargaining agreement limits access to the grievance and arbitration mechanism to "[a]ny dispute concerning the interpretation or application of this Agreement *other than a jurisdictional dispute* . . ." (emphasis added). Meiswinkel informed the arbitrator that the dispute was a jurisdictional dispute and that the work assignment issue was before the NLRB for determination.

On July 16, 1982, the arbitrator issued his award upholding the Laborers' claim that they were entitled to Meiswinkel's cleanup work. The arbitrator held that "since the

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[2] The NLRB has authority under Section 10(k) of the National Labor Relations Act, 29 U.S.C. § 160(k), to make a determination on jurisdictional disputes between competing unions, where a union has engaged in threats or coercion to force the employer to assign the disputed work to its members. *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116 (1971).

Employer (Meiswinkel) is bound to the Laborers Memorandum Agreement, the work in issue, i.e., 'cleanup of debris,' falls within the jurisdiction of the Memorandum Agreement. The claim of the union is therefore sustained."

Although Meiswinkel had specifically requested the arbitrator to address the jurisdictional dispute issue he failed to do so. Meiswinkel moved for reconsideration, again challenging the authority of the arbitrator to act because the grievance arose from a jurisdictional dispute. The arbitrator did not act on that motion.

When the NLRB issued its Section 10(k) determination, finding the existence of a jurisdictional dispute and awarding the scrapping and cleanup work to the Carpenters, Meiswinkel filed a Petition to Vacate Arbitration Award and successfully moved for summary judgment. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court vacating the arbitrator's award.

ARGUMENT

The decision of the court of appeals vacating the arbitrator's award is correct and does not conflict with any decision of this Court or of any court of appeals. Further review is unwarranted.

1. The courts below concluded that the arbitrator's award did not draw its essence from the collective bargaining agreement because it was in direct conflict with contractual language denying the arbitrator power to decide jurisdictional disputes. Petitioners do not challenge the well-established principle that an arbitrator's award is legitimate "only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United*

but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Rather, they contend (Pet. 7) that in determining that the dispute was in fact jurisdictional the Ninth Circuit inappropriately "reweighed the merits of the grievance and substituted its own judgment for that of the arbitrator" (Pet. 15).[3] Petitioners' contention is erroneous.

The Ninth Circuit acknowledged that "[c]ourts should decline to review the merits of arbitration awards . . ." leaving the question of contract interpretation to the arbitrator. (Pet. App. A9). *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, (1960). But, the courts must decide whether the parties agreed to arbitrate the grievance or to give the arbitrator power to make the award he made. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Pacific Motor Trucking Co. v. Automotive Machinists Union*, 702 F.2d 176 (9th Cir. 1983).[4] Mindful of this obligation, the court of appeals

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[3] Respondent does not dispute Petitioners' argument (Pet. 6-10) that under the holdings of this Court in the "Steelworkers Trilogy" the courts must not weigh the merits of a grievance or substitute its judgment for that of the arbitrator. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). But, as discussed *infra*, the courts below did not do so. Therefore, contrary to Petitioners' assertion, the decision of the Ninth Circuit herein does not conflict with the holdings of this Court or of any other circuit.

[4] The cases cited by Petitioners (Pet. 8-10) are not in conflict. *Kewanee Machinery Division v. Local Union No. 21, IBTCW&H of A*, 593 F.2d 314 (8th Cir. 1979) (court decided whether arbitration award drew its essence from the contract); *International Association of Machinists v. Texas Steel Co.*, 538 F.2d 1116 (5th Cir. 1976) (when an arbitration award has been made, the courts are concerned with whether the dispute was actually arbitrable and whether dispute drew its essence from the agreement); *Painters Local Union No. 171 v.*

appropriately limited its inquiry to whether the issue before the arbitrator involved a jurisdictional dispute and was thus not arbitrable.

The court recognized the arbitrator's authority to decide whether the dispute was jurisdictional but found that he did not do so (Pet. App. A12). In the absence of such a ruling by the arbitrator, the court "[did] not know whether or how this issue was decided" (Pet. App. A13). In these circumstances, the court was called upon to decide, in the first instance, if the issue involved a jurisdictional dispute.

The court found that "[i]t is clear from the uncontroverted facts in the record that the dispute was jurisdictional" (Pet. App. A14). In reaching that decision, the court did not have to review the merits of the arbitration award or substitute its judgment for that of the arbitrator. Rather, it did so upon the arbitrator's failure to rule on the issue. (Pet. App. A13).

Based on its finding that the dispute was jurisdictional, the court concluded that the arbitrator's award "was implausible and ignored clear contractual language denying him jurisdiction . . ." (Pet. App. A13). It therefore vacated the award because it did not draw its essence from the collective bargaining agreement. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582 (1960). The opinion of the circuit court is

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Williams & Kelley, Inc., 605 F.2d 535 (10th Cir. 1979) (court will not review merits of arbitration award which draws its essence from a collective bargaining agreement); *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969) (court review is confined to question whether parties agreed to arbitrate or gave arbitrator power to make the award); *George Day Construction Co. v. United Brotherhood of Carpenters, Local 354*, 722 F.2d 1471 (9th Cir. 1984) (court is charged with the duty of deciding the issue of arbitrability).

consistent with well-established precedent and raises no issue of law requiring resolution by this Court.

2. Petitioners apparently disagree with the conclusion of the courts below that the arbitrator failed to decide whether the issue before him involved a jurisdictional dispute. They contend that the arbitrator *de facto* decided that the dispute was not jurisdictional in that he proceeded to decide the issue on its merits (Pet. 13).[5] Petitioners merely challenge the finding of the lower courts to the contrary. Whether the arbitrator decided this question presents a factual issue not warranting further review by this court. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502-03 (1951).

3. Petitioners also suggest that if the court felt that the award could not be confirmed "because of its lack of clarity," the case should have been remanded to the arbitrator for clarification (Pet. 14). But, the court vacated the award because it ignored the clear contractual language denying the arbitrator jurisdiction to decide the dispute, not because the award was ambiguous or lacking in clarity.

Further, if the case were remanded and the arbitrator found the dispute not to be jurisdictional, such conclusion would be in direct conflict with the preeminent decision of the National Labor Relations Board. The NLRB found the dispute to be jurisdictional and awarded the work to the Carpenters.[6] If the Board had found that no jurisdictional dispute existed because the unions were not in competition over a work assignment, as Petitioners contend herein, it would have dismissed the Section 8(b)(4)(D) charge and

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[5] On this premise, they argue that in finding the dispute to be jurisdictional, the lower courts necessarily "reweighed" the evidence and "substituted its judgment for that of the arbitrator."

[6] *Bay Counties District Council of Carpenters*, 265 NLRB 646 (1982).

quashed the Section 10(k) notice of hearing. *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. at 135 (1971). But, where the Board has issued a decision in a jurisdictional dispute, that decision takes precedence over a conflicting arbitration award of the work in question. *New Orleans Typographical Union No. 17 v. NLRB*, 368 F.2d 755 (5th Cir. 1966). See also, *Cannery Warehouseman v. Haig Berberian, Inc.*, 623 F.2d 77 (9th Cir. 1980). Accordingly, remand would not be appropriate in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: February 6, 1985

Respectfully submitted,

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